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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 229

JULIA C. COLLINS AND HATTIE L. MOSHER,
Petitioners,

v.

JOE O'CONNELL AND JESSIE B. O'CONNELL, HUSBAND AND WIFE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS OWEN MARLAR,
Counsel for petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Greeting:

Your petitioners respectfully show:

I

Statement of Matter Involved.

Certiorari is sought to resolve a question of Public Importance arising from conflicting property rights of a resi-

dent, and citizen, of Oregon, and a resident, and citizen, of Arizona, of real property located in the State of Arizona.

The matter also involves the power of an agent under a Power of Attorney to act and bind the principal, without actual knowledge, and the rights of a third party under such an act, having both constructive and actual knowledge.

II

Reasons Relied Upon for Allowance of Writ.

1. Decision of the Circuit Court of Appeals, Ninth Circuit, is contrary to, and in conflict with, the decision of the Arizona Supreme Court in the case of:

P. W. Litchfield, Appellant, v. *H. H. Green, Appellee,* 43 Arizona, 509; 33 Pac. (2d) 290;

which held:

> "Person dealing with agent is bound to ascertain nature and extent of authority, and if either is controverted burden of proof is upon him to establish it."

Had this cause been in the State Court the above rule would have been followed for in the case of:

Waddell v. *White,* 56 Arizona, 525, 527;

> "We have stated more than once that we would follow the principles set forth in the Restatement, but we expected cases where a different rule had been laid down by previous decisions of this court."

The Federal Courts were bound to follow the above.

It is well settled that where no Federal Question is involved, Federal Courts are bound by the decisions of the courts of the state in which they sit as to any substantive matter. In:

West et al. v. *American Telephone and Telegraph Co.,* 311 U. S. 223;

the rule is announced in the syllabus as follows:

"2. A rule announced and applied by state courts as the law of the state, though not passed on by the highest state court, may not be rejected by a Federal Court because it thinks that the rule is unsound in principle or that another is preferable.

3. In deciding local questions it is the duty of the Federal Court to ascertain from all available data what the state law is and apply it, however superior a different rule may appear from the viewpoint of general law and however much the state rule may have departed from prior decisions of the Federal Courts."

Cited with approval in:

Huron Holding Corporation et al. v. *Lincoln Mine Operating Company,* 312 U. S. 183, 189.

In:

State Bank of Hardinsburg v. *Brown et ux.,* 317 U. S. 135; deecided November 16, 1942;

the court, by Mr. Justice Roberts, stated:

"Because of conflict of decisions we granted certiorari."

In the Opinion in:

P. W. Litchfield v. *H. H. Green,* 43 Arizona, *supra,*

pages 510 & 511, the court followed:

Brutinel v. *Nygren,* 17 Arizona 491; 154 Pac. 1042;

which case in quoting:

Machem on Agency,

Stated—

"The mere fact that one is dealing with an agent, whether the agency be general, or special, should be a

> danger signal, like a railroad crossing suggests the duty to 'Stop, look and listen' and if he would bind the principal is bound to ascertain not only the fact of agency but the nature and extent of the authority and in case either is controverted the burden of proof is upon him to establish it. In fine he must exercise due care and caution in the premises.''

It has also been said by the Supreme Court of Arizona that the duty of an agent to exercise his duties faithfully rest upon positive law and not upon estoppel. See:

Button v. *Wakelin,* 41 Arizona 84; 15 Pacific (2d) 956.

The Court of Appeals decision holds there was no obligation on the part of Respondents, herein, to use the caution exacted by the Supreme Court of the State of Arizona. The Opinion of the Circuit Court of Appeals, Ninth Circuit, is printed, in full, on pages 274 to 280, inclusive, of the Transcript of Record.

Where there has been a determination on a question by the highest court of a state the Federal Courts must apply it, if not in conflict with Federal Statutes.

West et al. v. *American Telephone and Telegraph Co.,* 311 U. S. 223.

2. The decision of the Circuit Court of Appeals, Ninth Circuit, is in conflict with the principle of law announced by the Circuit Court of Appeals, Sixth Circuit, in the case of:

Findlay v. *Pertz,* 66 Fed. 427, 434.

This decision of the Sixth Circuit was cited, followed, and approved, in the case of:

United States v. *Carter,* 217 U. S. 307.

Where there are conflicting decisions of two separate circuits certiorari has been granted.

State Bank of Hardinsburg v. *Brown et ux.,* 317 U. S. 135, *Supra.*

3. If the decision of the Ninth Circuit Court of Appeals be not reversed title to real property may be conveyed by acts of an agent against his principal by "Equitable Estoppel." Such is contrary to the weight of authority and against Public Policy.

Paul W. Litchfield v. *H. H. Green,* 43 Ariz. 509; 33 Pac. (2d) 290; and *City of Findlay* v. *Pertz,* 66 Fed. 427.

Statement of Jurisdiction.

a. The Jurisdiction of the District Court was acquired by Removal Proceedings. Complaint, (R. 2), and Petition for Removal, (R. 268).

a. The jurisdiction of the District Court was acquired by United States Code Annotated, Title 28, Section 71, and Judicial Code Section 24 (1). Order for Removal, (R. 7). The Jurisdiction of the Circuit Court of Appeals is sustained by United States Code Annotated Title 28, Section 225, and Judicial Code, Section 24 (1).

c. The decree of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed was filed June 1, 1943. Rehearing denied June 24, 1943 (R. 282).

d. The Orders of the District Court, (R. 29 to 35), inclusive, being the Court's

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT QUIETING TITLE,

which were approved and adopted in the Minute Entry of January 7, 1942, (R. 28 and 29), as well as all of the Minute Entries of the Court, (R. 25 to 29), inclusive, affirmed by the Ninth Circuit Court of Appeals, operate to determine the ultimate rights of the Petitioners and to conclude finally a question of Public importance in that it purports to transfer Real Property Rights by Equitable Estoppel con-

trary to and in conflict with the laws of the State of Arizona relating to the transfer of real property rights, and a previous decision of the United States District Court for the District of Arizona, relating to the same property and the same Appellant, Julia C. Collins, in E-319. This Court is asked to read pages 234 to 238, inclusive, which is the Findings of Fact in E-319. The Exhibits in that case of recorded documents are the identical ones in the Instant Case.

e. There is a Conflict of Decision between the Sixth Circuit and the Ninth Circuit Courts of Appeal. See:

State Bank of Hardinsburg v. *Brown et ux.*, 317 U. S. 135.

Opinions Below.

The Findings of Fact and Conclusions of Law of the United States District Court for the District of Arizona were entered January 7, 1942, without an Opinion; see pages 29 to 35, for Findings, and pages 36 and 37, for Conclusions. The Opinion of the Ninth Circuit Court of Appeals was filed June 1, 1943, and will be found complete in the Transcript of Record, pages 274 to 280, inclusive.

Statement of the Case.

Green and Griffin were originally the owners of Lots 1 and 2, Block 3, Churchill Addition to the City of Phoenix, Maricopa County, Arizona.

They executed a mortgage for $9,000.00 on this property to J. Gerard. The property was then deeded to Hattie L. Mosher subject to the mortgage. The mortgage was later assigned to Julia Mosher-Collins by J. Gerard. Julia Mosher-Collins executed a General Power of Attorney to Hattie L. Mosher and Hattie L. Mosher using this Power of Attorney purported to assign this Gerard $9,000.00 mortgage from Julia Mosher-Collins on her own land to James Dean Collins.

After the death of Julia Mosher-Collins James Dean Collins purported to release Lot 2, which was one-half of the mortgaged land, with no reduction of the original amount of $9,000.00, and Hattie L. Mosher then executed another mortgage upon the same property released to Elsie B. Ganz for $6,000.00.

Elsie B. Ganz foreclosed the mortgage from Hattie L. Mosher to herself but did not include in her foreclosure suit Julia C. Collins who is the daughter and sole heir of Julia Mosher-Collins, deceased.

Julia C. Collins did not recognize the validity of the assignment from, and by, Hattie L. Mosher, made with her Power of Attorney, to James Dean Collins, nor of the Release of Mortgage based thereon nor of the mortgage executed to Elsie B. Ganz by Hattie L. Mosher.

Julia C. Collins through her guardian ad litem brought suit as the owner of the old $9,000.00 Gerard mortgage against Hattie L. Mosher and got judgment resulting in a Certificate of Sale and a Deed from the Special Master appointed by the Court making her the sole owner of Lot 2, Block 3, Churchill Addition.

Joe O'Connell and Jessie B. O'Connell, Grantees by deed from Elsie B. Ganz, now bring suit to set aside the deed of the Special Master and the Question is were the things done leading up to the Ganz deed legal and was the old Gerard mortgage properly assigned and satisfied. The burden of establishing the title of Elsie B. Ganz and Joe O'Connell of course rests upon the appellees, and the appellants raised some sixteen objections to the sufficiency of the evidence and the proceedings, laying special stress, however, upon the question of the validity of the purported assignment by Hattie L. Mosher to James Dean Collins and the release of said Gerard mortgage by James Dean Collins. If this assignment and release were invalid, then the Gerard mort-

gage was never satisfied and descended to Julia C. Collins and she is now the owner of the property.

The Gerard mortgage was extended by agreement between J. Gerard and Hattie L. Mosher dated October 7, 1918, extending the time of payment for ten years, to February 24, 1928. A year later J. Gerard sold this mortgage to Julia Mosher-Collins. A year later Hattie L. Mosher used her daughter's power of attorney in an attempt to assign the mortgage to her son in law, James Dean Collins, for the purported full amount of the mortgage. Two months later the original owner of the mortgage, Julia Mosher-Collins, dies, May 4, 1920. About a year after the death of Julia Mosher-Collins, her mother, Hattie L. Mosher, transacts the following business with the Recorder of Maricopa County, Arizona:

1. Power of Attorney from Julia Winifred Mosher Collins to Hattie L. Mosher. Recorded at request of Hattie Mosher, April 2, 1921, at 11:57 P. M. Dated July 20, 1915.

2. Assignment of Mortgage from Julia Mosher Collins to her husband, James Dean Collins. Recorded at request of Hattie Mosher April 18, 1921, at 1:11 P. M. Dated March 1, 1920.

3. Partial Satisfaction of Mortgage releasing Lot 2, Block 3. Recorded at request of Hattie Mosher April 18, 1921, at 1:12 P. M. Dated April 11, 1921.

The questions presented and the Specification of Errors are covered in the Reasons Relied upon for Allowance of Writ.

BRIEF AND ARGUMENT.

The decision of the Circuit Court of Appeals is based solely on the fact that the Respondents herein did not have notice of the Interest of the Petitioners in the property at issue. In their Opinion, Transcript of Record, pages 274 to 280, inclusive, on page 278, it is stated:

> "That Mrs. Mosher was also the record owner of the mortgaged premises was not enough to constitute notice to the appellees that she had a personal interest in the transaction in which she acted as agent and therefore that a valid claim under the $9,000.00 mortgage existed."

This we submit was in itself sufficient to put the Respondents on Notice. In addition the record clearly shows that the Respondents Joe O'Connell et al. had continually dealt with Mrs. Mosher concerning this property. Pages 74 to 80, inclusive. This brings the case clearly within the principle and rule announced.

In addition to the foregoing the Writ of Certiorari should also be granted as the decision of the Ninth Circuit Court of Appeals is in direct conflict with not only the Sixth Circuit Court of Appeals but also the great weight of Authorities, such as, in the case of:

> *Glover* v. *Ames,* 8 F. 351; from the Circuit Court D, Maine;

it was held:

> "Contract was held invalid because the agent had a personal interest in the sale of a brig." * * *

also:

> "(1) That B, as agent, in thus disposing of the vessel to C to pay a firm debt, for which he was individually accountable, was acting in a matter in which his own per-

sonal interests were in conflict with the interests of the plaintiff, and the sale was therefore invalid."

In the case of:

City of Findlay v. *Pertz,* Circuit Court of Appeals, Sixth Circuit; 66 F. (starts on page 427)

The court quotes at page 434, from:

Leake on Contracts, 3rd Ed. 409,

as follows:

" 'An agent cannot be allowed to put himself in a position in which his interest and his duty conflict.' "

The Court then says that:

"The tendency of such agreement is to corrupt the fidelity of the agent, and is a fraud upon the principal, and is not enforceable, 'even though it does not induce the agent to act corruptly'."

The Sixth Circuit continues in *Findlay* v. *Pertz:*

" 'It would be most mischievous to hold that a man could come into a court of law to enforce a bargain on the ground that he was not in fact corrupted.' "

Wald's Pol. Cont. 245, 246, note,

citing:

Harrington v. *Dock Co.,* 32 B. Div. 549, and other cases;
Taussig v. *Hart,* 58 N. Y. 425;
United States Rolling Stock Co. v. *Atlantic & G. W. R. Co.,* 30 Ohio State, 450 to 480;
Young v. *Hughes,* 32 N. J. Eq. 372;
Smith v. *Sorby,* 3 Q. B. Div. 552;
Yeoman v. *Lasley,* 40 Ohio State 190.

"Contract made by agent acting for both parties may be rescinded by buyer having no knowledge of the dual

capacity of the agent." (See next paragraph for DUAL capacity.)

City of Findlay v. *Pertz*, 66 Fed. 427, 13 C. C. A. 559, 31 U. S. App. 340. Supra.

In the case at bar, *Collins* v. *O'Connell*, the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States are most respectfully requested to examine the ASSIGNMENT OF MORTGAGE on page 183 of the Transcript of Record. This is the instrument which is the only basis for the respondent's, O'Connell's, claim. This shows conclusively that Hattie L. Mosher was acting; not only, was acting in a DUAL capacity; but acting in a QUADRUPLE capacity. She was acting in the shoes of Julia Mosher Collins, as Assignor of an Assignment of Mortgage. She was acting as Agent for James Dean Collins, as Assignee of an Assignment of Mortgage, although there was nothing, anywhere, in the record that showed that she was authorized to act for Collins in accepting it. Any instrument has to be accepted as well as given. She was acting as agent for an infant as shown on page 2, paragraph 3, of the Petition for Rehearing, which refers to T. R. 15, which says:

"* * * was an infant at the time of the death of her mother, Julia Mosher Collins, May 4, 1920, * * *."

The FOURTH capacity in which she acted was for herself, for her own benefit, in changing the ownership of a mortgage on her own land into the ownership of her son in law. Likewise, in case of the death of the mother, getting the mortgage out of the probate laws of the State of California, where Mrs. Collins died, or out of the probate laws of the State of Oregon, of which the father, mother and baby were all citizens. The death of Mrs. Collins, by law,

was compelled to be a matter of record in Sacramento, whereby the Respondents had full NOTICE of her death a year before the assignment was placed of record in Maricopa County, Arizona. Regardless of the tradition, accepted by all courts, that it is CAVEAT EMPTOR for the buyer, Mrs. Ganz, well knew that the $9,000.00 was the first mortgage and her mortgage was the second mortgage. See Page 101 of the T. R. The Respondents are standing in Mrs. Ganz's shoes.

Further, the Basic Assignment was an instrument which had to be put on record by either the Grantee, the recipient, or an agent for one of them. It is fundamental that any instrument must be recorded by some one who has the right to so do.

The only right Hattie L. Mosher had to act as agent for Mrs. Collins (no matter whether the Power of Attorney was left with Mrs. Mosher, or not, see page 83, of the T. R.) was under the Power of Attorney, regardless. A Power of Attorney dies "dead" at the death of the giver thereof. Hattie L. Mosher had no more right to act for Mrs. Collins as her agent in recording the agency than she had a right to execute any instruments for Mrs. Collins after her death. It is very clear that Mrs. Mosher never held any power of agency from James Dean Collins. Any such power of agency in any matters affecting real estate must be duly recorded. Mrs. Mosher absolutely could not act as agent for Mr. Collins in recording the Assignment, as such recordation is an acceptance of the instrument and can only be done by the recipient or his recorded agent. As the Power of Attorney was not recorded until after the death of the giver thereof, and the giver had been dead a year, the recordation was merely that of an absolutely dead instrument. It could not, for any purpose whatever, exist after the last breath of Mrs. Collins, aside from the fact that Mrs. Mosher could not

act as agent in the recordation after her agency died. While under Arizona Laws any instrument directly made by the grantor thereof can be recorded after the death of the grantor an instrument recorded by an agent after his agency is dead is void and of no effect. Therefore, the record clearly shows that for the purposes of the case at bar, the Power of Attorney in Plaintiffs' Exhibit 4, Page 185 of the Transcript of Record, has been eliminated.

Until the recordation of the Power of Attorney it was strictly a private matter between Mrs. Collins and Mrs. Mosher and could not be used for any purpose to bind any other person, either for their benefit or injury. In the two months that had elapsed between the purported assignment and the death of Mrs. Collins she could not have been estopped by a power of agency that affected only herself and the purported agent. She had no knowledge in law, either constructive, or otherwise, that her agent would after her death place the instruments of record. As the law ascribes knowledge of the acts of an agent to his principal then Mrs. Collins had knowledge as shown on Pages 93 (bottom) and 94, brought out by Mr. Gust on cross examination: Answer by Mrs. Mosher—"My memory is clear, because I put everything in my own safety box and kept it there. Why should I scatter things all over the country?" The Respondents proved, themselves, that the Assignment was not delivered.

It will be obvious to this court from the dates of the various instruments that the action is controlled by the—Revised Statutes Arizona 1913 Civil Code, which recites in Paragraph 2073—"The acknowledgment of an instrument for the purpose of being recorded shall be made as follows: * * * (4). If by a person acting under a power of attorney, by such person appearing before such officer and stating that he, as attorney in fact for his principal, exe-

cuted such instrument for the purpose and consideration therein expressed." Paragraph 2068 said—"It shall not be deemed lawfully recorded unless it has been previously acknowledged in the manner hereinafter prescribed."

National Cash Register Co. v. *Bradbury,* 12 Arizona, 99, 95 Pacific 180.

Pages 184 and 185 of the T. R. show that the acknowledgment made by Hattie L. Mosher, to the Assignment, was merely a personal one and not made by virtue of the Attorney in Fact. Therefore, "It shall not be deemed lawfully recorded * * *". The body of this instrument, page 183, T. R. certainly gave NOTICE to the whole world, and especially to any prospective buyer, that Hattie L. Mosher was vitally interested in the Actual Mortgage to an extent of being interested in the person who held that mortgage against her own land, and that she did not want her daughter to hold it, and in the event of her death she did not want an infant, who would be controlled by a guardian, to own it. It would be harder to conceive of any interest more omnipresent than the interest of Mrs. Mosher in controlling the ownership of a mortgage against her own land. As for the attempt of Mrs. Mosher to transfer the Power of Attorney she held from Mrs. Collins to another by merely signing—Julia Mosher Collins by Hattie L. Mosher, her Attorney-in-Fact, is hardly even worthy of comment. See page 184 of the T. R. A power of attorney is not like one of those "CHAIN LETTERS" finally suppressed by the Government. It cannot be passed on and on, in an endless chain, to the end of time by one holder to another holder. To be sure it was merely surplusage, as the bare assignment carried the right to foreclose.

It is elemental that an heir inherits with the passing of the last breath subject only to the debts of the deceased; there-

fore the infant Julia C. Collins inherited at the death of her mother unaffected by any unrecorded instruments. As it is often expressed "An heir inherits as though they were the original purchasers".

Had all been correct in the basic assignment the only recourse Mr. Collins would have had against the holding back from recording of his assignment would have been a claim against her estate for the purported value of the old Gerard Mortgage. His deceased wife would unquestionably have been liable to him for the failure of the agent to record the assignment. The record shows, in the cross examination of John L. Gust, pages 88 to 100, inclusive, that the deceased Mrs. Collins was a woman of considerable wealth.

Further Citations of Interest among the countless ones pertaining to the subject matter are (in the First Division of the U. S. D. C. of Kansas):

Stephens v. *Gall*, 179 Federal 938; which quotes:
Keighler v. *Savange Mfg. Co.*, 12 Md. 383, 71 A;
Mechem on Agency, Section 455;
Tisdale v. *Tisdale*, 2 Sneed (Tenn.) 596;
64 Am. Dec. 775; (all quoted in D. C. of Kansas) which said: In *Tisdale* v. *Tisdale*, quoting from: *Stephens* v. *Gall*, 179 Federal 938 at 941:

"* * * Has its foundation, not so much in the commission of actual fraud, as in the profound knowledge of the human heart which dictated that hallowed petition: 'Lead us not into temptation, but deliver us from evil;' and that caused the announcement of the infallible truth that 'a man cannot serve two masters' "

Fox v. *Simons* (251 Ill. 316), 96 N. E. 233, on page 235;
1 Perry on Trusts (6th Ed.) Sec. 206;
Tyler v. *Sanborn*, 128 Ill. 136; 21 N. E. 193; 4 L. R. A. 218, 15 Am. St. Rep. 97;
1 Pomeroy's Eq. Jur., Sec. 155;

Prince v. *Dupuy,* 163 Ill. 417; 45 N. E. 298;
Swindell v. *Latham,* 145 N. C. 144; 122 Am. St. Rep. 430; 58 S. E. 1010.

The Supreme Court of Oregon has said:

"The fidelity of an agent demands this rule:

The acts of an agent in dealing with the subject-matter of his trust or agency which has been confided to his care are scrutinized by the court with jealous care and may be set aside on slight grounds. Citing:

Twin-Lick Oil Co. v. *Marbury,* 91 U. S. 587; 21 L. Ed. 328."
Burton v. *Lithic Mfg. Co.,* 73 Or.; 144 Pac. 1149 at 1151.
In re Acken's Estate, 144 Iowa 519; 123 N. W. 187;
Hutton v. *Sherraid,* 183 Mich. 356; 150 N. W. 187.

The Eighth Circuit Court of Appeals is another Circuit Court that is in conflict with the Decision of the Ninth. It said:

"* * * that an agent must use his authority with an eye single to the interest of his principal."

Savin v. *Bierbaum,* 281 Fed. 500 (8th Circuit).

The Supreme Court of the United States, itself, is in opposition to the decision at bar and says, in

Roberson v. *Chapman,* 152 U. S. 673 at 681-2:

"* * * While his agency continues, he must act, in the matter of such agency, solely with reference to the interests of his principal. THE LAW WILL NOT PERMIT HIM, WITHOUT THE KNOWLEDGE OR ASSENT of his principal, to OCCUPY A POSITION IN WHICH HE WILL BE TEMPTED NOT TO DO THE BEST HE MAY FOR THE PRINCIPAL."

A very prominent decision was that made by Judge W. S. Fly, Chief Justice of the Court of Civil Appeals, of Texas, who wrote the opinion in:

Binder v. *Milliken,* 201 S. W. R. P. 239. Opinion begins on page 240; he said:

"(3)—* * * and when the agent turns aside from the plain paths of his agency and seeks individual advantage * * * HIS AUTHORITY IS AUTOMATICALLY REVOKED. He cannot be permitted to hold a position where self-interest and honor become contending forces, * * * 'The law * * * and holds them no longer capable of representing their principals * * *'"

In his Opinion in *Binder* v. *Milliken,* Judge W. S. Fly, Chief Justice, quotes a large number of accepted authorities. According to Judge Fly Mrs. Mosher's Power of Attorney was automatically revoked when she used it for purposes of her own benefit. It is rather glaring that transferring a Mortgage on her own land from a person she did not want to have hold it to another person she preferred to have hold it was what Judge Fly would call "INDIVIDUAL ADVANTAGE" and the whole World was thus given "NOTICE" of her interest in the mortgage.

Prayer.

WHEREFORE, Your Petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 10,187, Julia C. Collins and Hattie L. Mosher, Appellants, *v.* Joe O'Connell and Jessie

B. O'Connell, husband and wife, Appellees," and that the decrees of the United States Circuit Court of Appeals for the Ninth Circuit and the United States District Court for the District of Arizona may be reviewed, and that your Petitioners may have such other and further relief as to this Honorable Court may seem just; and your Petitioners will ever pray.

Conclusion.

In conclusion it is respectfully submitted that the Writ of Certiorari should be granted and the case be reversed after it is reviewed by this Honorable Court.

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(13)

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Husband and wife,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Husband and wife,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CASES CITED

None

OPINIONS DELIVERED

Trial Court wrote no opinion. The opinion of the Circuit Court of Appeals is officially reported in, 136 Fed. (2nd) 141 (Adv.) and is printed in the Transcript of Record, pages 274-280.

JURISDICTION OF SUPREME COURT

It is admitted that this court has jurisdiction of this case on certiorari. It is submitted, however that no ground for review is presented under Subdivision 5 of Rule 38 of this court.

STATEMENT OF THE CASE

Respondents filed suit to quiet title to a city lot in Phoenix, Arizona, against petitioners. The suit was removed to the United States District Court by petitioner, Julia C. Collins, upon grounds of diversity of citizenship and separable controversy.

The issue presented was the validity of an assignment of mortgage, made by petitioner, Hattie L. Mosher, under Power of Attorney from her daughter, the mother of petitioner Julia C. Collins said mortgage being a lien upon property then owned by petitioner Hattie L. Mosher. After the assignment was made, and before it was recorded, Julia Mosher Collins died. The trial court found the assignment was delivered in the lifetime of Julia Mosher Collins, and was valid, and entered judgment quieting title in favor of the plaintiffs in the suit,—respondents here.

Practically the only point urged for reversal in the Circuit Court of Appeals, and here is that the assignment of mortgage was void, upon the theory that petitioner, Hattie L. Mosher, donee in the Power, owned the property covered by the mortgage which was assigned by her under the Power.

The Circuit Court of Appeals rejected the contention, basing its decision upon the law of Arizona as expressed in the decisions of the Arizona Supreme Court, and affirmed the decision of the trial court.

ARGUMENT

Petitioner suggests, as a ground for certiorari, conflict with the decision of the Arizona Supreme Court in the case of *P. W. Litchfield, Appellant, v. H. H. Green, Appellee,* 43 Ariz. 509; 33 Pac. (2d) 290.

The two cases deal with wholly different subjects, and there is no conflict whatever between them.

The Circuit Court of Appeals recognized that under the rules of this court it was required to follow the decisions of the Arizona Supreme Court, and did so with unusual fidelity.

See, Opinion, Transcript 277-280.

The petitioners also suggest conflict between the decision in this case and the decision of the Sixth Circuit in the case of *State Bank of Hardinsburg, v. Brown,* 317 U. S. U. S. 135. This case presents only questions of local law, so there can be no conflict with a federal decision in another state.

It is respectfully submitted that the Petition for Writ of Certiorari is wholly without merit and must be denied.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 229

JULIA C. COLLINS AND HATTIE L. MOSHER,
Petitioners,

vs.

JOE O'CONNELL AND JESSIE B. O'CONNELL, HUSBAND AND WIFE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

THOMAS OWEN MARLAR,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 229

JULIA C. COLLINS AND HATTIE L. MOSHER,
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Respondents.

REPLY BRIEF OF PETITIONERS.

Errors in Respondents' Brief.

After having admitted jurisdiction of this Court respondents claim that no ground for review is presented under Subdivision 5, of Rule 38, of this Court. Page 3, of respondents' Brief in Opposition.

It is respectfully submitted that this is in error.

First—Because the Circuit Court of Appeals, Ninth Circuit, decided an important question of local law in a way probably in conflict with local decisions.

Second—The Appellate Court decided an important decision of general law in a way untenable and in conflict with the weight of authority. Rule 38, subsection 5 (b).

It was clearly shown in Petitioners' Brief in support of the Petition for Writ of Certiorari that the foregoing prerequisites of Rule 38, subsection 5 (b), were herein involved.

In the respondents' brief, page 4, it is stated:—

> "The petitioners also suggest conflict between the decision in this case and the decision of the Sixth Circuit in the case of State Bank of Hardinsburg *v.* Brown, 317 U. S. 135."

This is in error, likewise, as petitioners contend that the decision in the instant case is in conflict with:

Findlay v. *Pertz,* 66 Fed. 427, 434.

Bank of Hardinsburg v. *Brown, supra,* was cited solely to show that when there is a conflict of two separate circuits certiorari will be granted. Petitioners' Brief, page 4.

Estoppel.

There can be no estoppel on the Petitioner Julia C. Collins as the Power of Attorney to Hattie L. Mosher was void after the death of Julia Mosher Collins.

Power of Attorney Void After Death.

In *Wash* v. *Wash, et al.,* 189 Mo. 352, 87 S. W. 993, it is stated on page 995:

> "It is true that after her death her attorney filed a certified copy of the election in the recorder's office, but it is too plain for discussion, that when Mrs. Wash died her death revoked all powers of attorney which she had created in her lifetime, and that her attorney, after her death, could not complete her election by filing the copy of her election in the probate office in the recorder's office."

The above rule applies in the instant case and the assignment of mortgage could not be completed after Mrs. Collins' death by recording it.

> "Applying the principles discussed, a power of attorney to convey lands, or to collect debts, is terminated by the principal's death. Further, the attorney after the principal's death, may not complete an undertaking for the benefit of the principal and intended to be completed in the latter's lifetime."
>
> *American Jurisprudence Vol. 2*, paragraph 65, Page 56.

We submit that the above represent the universal weight of authorities.

In the case at bar it follows that the assignment of the mortgage was intended to be completed in Mrs. Collins' lifetime. It was a *pending transaction.* At her death it was not completed. It had no weight as an assignment of a mortgage until it was recorded. An unrecorded mortgage assignment could never be foreclosed. This transaction not having been completed by recordation in the lifetime of Mrs. Collins, the principal of the Power of Attorney, and the power of attorney having ceased to exist after the principal's death, its recordation a year after the authority of Hattie L. Mosher had ceased to exist could *not revive the dead.* The universal weight of all authorities is that *no pending transaction* can be completed after the death of the principal.

On page 16 of the Petition for Writ of Certiorari it will be seen that in addition to the decision of the Ninth Circuit being in conflict with the Sixth Circuit in *Findlay* v. *Pertz* it is also in conflict with a decision of the Eighth Circuit.

Conclusion of Reply.

In conclusion it is respectfully submitted that a Writ of Certiorari is entitled to be granted and the case reviewed by this Honorable Court wherein we pray for a reversal.

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